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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JACOBO MARTI & SONS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The Petitioner, Jacobo Marti & Sons, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on May 24, 1982.

QUESTION PRESENTED

Whether the National Labor Relations Board may, consistent with the Free Exercise clause of the First Amendment, assert jurisdiction over a cheese processing plant where the stipulated effect of such assertion would be to deprive the farmers in the New Wilmington, Pennsylvania Old Order Amish community of the only remaining method of marketing their milk that does not violate their religious tenets which, inter alia, prohibit their use of electricity, refrigeration, Sunday work, and their dealing with or associating with labor organizations?

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OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit (App. A, infra) is reported at 676 F.2d 975. The opinion of the Court of Appeals enforces the decision and order of the National Labor Relations Board (App. C, infra) which is reported at 255 N.L.R.B. No. 189 (1981).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on May 24, 1982 (App. B, infra). This petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

STATUTES INVOLVED

This case generally involves the National Labor Relations Act, 29 U.S.C.

§151 et seq., but does not involve the interpretation of any specific section of that statute.

STATEMENT OF THE CASE

This case arose as a result of a charge which was filed by Walter W. Holler against Petitioner Jacobo Marti & Sons, Inc. ("Jacobo Marti" or the "Employer") with the National Labor Relations Board ("NLRB" or the "Board"), alleging that the Employer had violated Sections 8(a)(1) and (3) of the National Labor Relations Act ("NLRA" or the "Act") by discharging him on September 18, 1979.

Jacobo Marti[1] is a Pennsylvania corporation located in New Wilmington, Lawrence County, Pennsylvania. Jacobo Marti operates and manages a cheese processing and production plant for the Farmers' Cheese Cooperative Association (the "Association"), which is an

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[1] Jacobo Marti & Sons, Inc. is a closely held family corporation which has no parents, subsidiaries or affiliates within the contemplation of Rule 28.1 of the Rules of the Supreme Court.

agricultural cooperative association formed by, and in the control of, the Old Order Amish farmers in the New Wilmington area for the purpose of marketing their agricultural products. The Association employs Jacobo Marti pursuant to a cheesemaker/manager contract to process its raw milk into cheese and cheese by-products. The Employer exists solely because of this relationship; its only function has always been the making of cheese for the Association from members' milk.

The relationship between Jacobo Marti and the Association first arose in the mid-1950s. At that time, laws were passed in Pennsylvania regulating the storage temperature of raw milk which was to be marketed for consumption. Because the Amish, under their religion, did not believe, inter alia, in the use of electricity or refrigeration, they could not meet the maximum temperature restrictions imposed by the new law through their use of ice or water as a coolant. Their milk could no longer be marketed as such. The Association was formed and

constructed a building for the sole purpose of processing the milk of the New Wilmington Amish sect into cheese -- a less profitable product, but one through which milk could be marketed without the Amish running afoul of the temperature restrictions of the new law.[2] The building constructed by the Association is the plant involved in this proceeding.

The Association contracted with Jacobo Marti, a cheesemaker, to manage this plant to process the milk of the Amish farmers into cheese. The contract between Jacobo Marti and the Association remains in effect today. By its terms, the contract may be terminated at will by either party upon ninety days notice.

In the early 1960's, Jacobo Marti and his wife, Mary Jane Marti, purchased the land and buildings of the plant from the Association. Otherwise, Jacobo Marti's relationship as cheesemaker/manager for the Association remained unchanged. A few

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2 See, J. Hostetler, Amish Society (Rev. ed.), at 99; Dilling, Religion Boosts Domestic Cheese Output, American Butter Review (April 1950).

years later, Jacobo and Mary Jane Marti formed the corporation which is the Employer in this case. The land and buildings were transferred to the Employer and it assumed without change the performance of the Association cheesemaker agreement.

All of the cheese processed and produced at the plant is and remains the property of the Amish-controlled Association, from its delivery as raw milk through its ultimate sale as a finished cheese product. The Employer does not process any milk or produce any cheese except that of the Association. Indeed, the relationship with the Association is the sole reason for the original and continued existence of the Employer, and consequently the sole reason why persons are employed at the plant.

Pursuant to the cheesemaker agreement, Jacobo Marti employs all persons who work at the plant and is fully responsible for all of the operating costs and expenses of the plant. In turn, the Employer receives as its source of income a manager's commission from the Association based upon

cheese production and sales of the Association.

It is a stipulated fact that the Association has informed Jacobo Marti that, because of the tenets of the Old Order Amish religion, it will immediately terminate its agreement with Jacobo Marti should the Employer's employees form, organize or join a labor organization. Thus, because the Amish have no market for their milk other than the cheese production plant managed by Jacobo Marti, the effect of the Board's assertion of jurisdiction over Jacobo Marti will be to deprive the Amish farmers of the only remaining market for their milk. As an additional consequence, the 20 Amish Association members who also work at the plant would be required to quit. Moreover, since all of the milk processed by Jacobo Marti is owned by the Association and most of the milk processed is produced by Amish farmers, it is highly unlikely that Jacobo Marti could remain in business if the Association terminated the Agreement.

This case was tried before an NLRB Administrative Law Judge ("ALJ") who on September 26, 1980 issued a Decision and

Recommended Order, finding that the Employer had violated Section 8(a)(1) of the Act by threatening employees with plant closure if the Amish milk supply were lost and by promising increased wages and better working conditions, but concluding that Jacobo Marti's discharge of Holler was not a violation of NLRA Section 8(a)(3). The ALJ further found that the Board could assert jurisdiction over the Employer despite the symbiotic relationship between Jacobo Marti and the Amish-controlled Association. See App. C at 21a-54a.

On October 24, 1980, the Employer filed Exceptions to the ALJ's Decision, and the General Counsel filed Cross-Exceptions on November 14, 1980. On May 12, 1981, the Board issued its Decision and Order, in which the Board adopted the Recommended Order of the ALJ in its entirety, without substantive comment. See App. C, infra. Subsequently, the Employer filed a Petition for Review with the United States Court of Appeals for the Third Circuit, and the Board cross-petitioned for enforcement of its Order.

On April 26, 1982 the Third Circuit issued its opinion enforcing the Board's

Order in all respects. In rejecting the Employer's constitutional challenge to the Board's assertion of jurisdiction, the Third Circuit concluded that the burden was on Jacobo Marti to prove that it "comes within an exception to the Board's jurisdiction", citing therefor this Court's recent decision in United States v. Lee, ___ U.S. ____, 50 U.S.L.W. 4201 (1982). Although noting that the record demonstrated that in Marti's only other organizational campaign, in 1973, the Association had advised Jacobo Marti that it would be required by religion to terminate their relationship if Jacobo Marti's employees unionized, the Court went on to speculate that the Amish-dominated Association may not continue to adhere to that precept today, because the record did not establish an absence of change in belief. Based on this speculation, the Third Circuit ruled that "[t]he employer here has failed to show that the governmental obligation to be imposed 'interferes with the Free Exercise rights of the Amish.'" App. A at 14a-15a (quoting United States v. Lee, supra, 50 U.S.L.W. at 4203).

REASONS FOR GRANTING THE WRIT

This case presents unique, important and, in the words of the Third Circuit Court of Appeals, "troublesome", issues concerning constitutional limitations upon the Board's assertion of jurisdiction over an Employer whose sole purpose from its very inception was to provide a method by which the Old Order Amish farmers in the New Wilmington, Pennsylvania Amish sect could market their milk without violating their religious proscriptions against the use of electricity and refrigeration. These issues are raised primarily because of the unrebutted evidence that if a labor union is certified as a bargaining representative of Jacobo Marti's employees -- a result which could conceivably flow from the Board's assertion of jurisdiction over the Employer[3] -- the result would be that the Amish controlled Farmers' Cheese

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[3]There is now pending at NLRB Case No. 6-RC-8838 a Petition for Certification of Representation filed by the United Food and Commercial Workers Local 298, AFL-CIO-CLC, which could lead to just that result. App. A at 13a.

Cooperative Association would be forced to terminate its agreement with the Employer because of the religious beliefs of the Association's members. Specifically, it was stipulated that the Association informed Jacobo Marti during a union organization campaign in 1973 that, because of the tenets of this Amish sect's religion, it would terminate its agreement with Marti if the employees were to organize, form or join a labor organization. Moreover, the unrebutted testimony of the Employer's president, Jack Marti, was that if the employees formed or joined a labor union, the Amish-controlled Association would stop sending their milk to him for processing into cheese. Since all of the milk processed by Jacobo Marti is owned by the Association, and most of the milk processed is produced by Amish farmers, it would be highly unlikely that the Employer could remain in business without the Association's milk. Even if the Employer could find some other source of milk, the business certainly could not be operated on the same scale that it is operated pursuant to its relationship with the Association, and all or almost all of

the employees would be out of employment for at least some significant period of time.

Thus, the results of the Board's assertion of jurisdiction over Jacobo Marti are two-fold. First, the effect of such assertion would be to destroy the only market which the Amish farmers currently have for their milk since, because of their religious tenets which precluded them from using electric refrigeration, they can not meet temperature requirements for milk storage imposed by state law beginning in the mid-1950's. Having lost that market, the Amish farmers turned to the cheese processing alternative and established the relationship which now exists between the Association and the Employer.[4] Because of the religious beliefs of the Amish -- which preclude them from joining or dealing with labor unions -- the Amish would be

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[4] The Third Circuit's reference to the fact that neither Marti nor the Association are "religious or religiously affiliated" organizations (App. A at 9a) misses the point. The Amish religious beliefs were, and still are, the sole reason for the creation and continued existence of both.

prevented from continuing their relationship with the Employer if the Employer were to be unionized, and would no longer be able to supply Jacobo Marti with milk for cheese processing. The effect would be totally to deprive the Amish farmers of a market for their milk and thereby to place a significant and potentially destructive economic burden upon the Amish community. Second, concomitant to this burden upon the Amish farmers is the potentially disastrous if not fatal, effect upon the ability of the Employer to remain in business if Jacobo Marti's relationship with the Association -- its sole supplier of milk -- were to be terminated.

Notwithstanding the above evidence, which demonstrates that the assertion of jurisdiction by the Board over Jacobo Marti would have the effect of forcing the Amish farmers to choose between adhering to their religious beliefs or giving up the only remaining market for their milk, the Third Circuit ruled that the Board's assertion of jurisdiction did not violate the Free

Exercise clause of the First Amendment.[5] In so ruling, the Third Circuit departed from this Court's decisions concerning the limitations placed upon government regulation by the Free Exercise clause.

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[5] The Third Circuit noted that the Board had not disputed Jacobo Marti's standing to assert the First Amendment rights of the Association and of its Amish members, and assumed that Jacobo Marti had standing for purposes of its opinion. App. A at 8a. Of course, Jacobo Marti does have such standing because if the Employer were prevented from asserting these rights, the Amish would never have an opportunity to obtain judicial review of the burden placed on their religion by the Board regulation, because the Amish farmers would never themselves be subjected to the spectre of the application of the NLRA to their activities. See, e.g., Griswold v. Connecticut, 381 U.S. 479, 481 (1965) (physician permitted to assert the rights of patients to receive contraceptives as a defense in prosecution for selling contraceptives). See also Barrows v. Jackson, 346 U.S. 249 (1953) (white defendant who was party to a racially restrictive covenant permitted to assert equal protection rights of prospective Negro purchasers in action to enforce restrictive covenant); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (owners of private schools entitled to assert First Amendment rights of potential pupils and their teachers).

Last term, this Court, in United States v. Lee, ___ U.S. ____, 50 U.S.L.W. 4201 (1982), held that the payment of social security taxes for employees by an employer who is a member of the Old Order Amish did not violate the Free Exercise clause of the First Amendment, notwithstanding the fact that payment of social security taxes or receipt of benefits violated the Amish religious beliefs. In Lee this Court, although ultimately rejecting the Constitutional challenge to the social security statute, reaffirmed the analysis which previously had been applied in decisions such as Thomas v. Review Bd. of Indiana Employment Security, 101 S.Ct. 1425 (1981), Wisconsin v. Yoder, 406 U.S. 205 (1972) and Sherbert v. Verner, 374 U.S. 398 (1963) for determining whether an otherwise valid statute of general applicability could be enforced under circumstances which imposed a burden upon the free exercise of religious beliefs.

The first step under this anaylsis requires the identification of a religious belief whose exercise would be infringed by the governmental regulation or conduct under scrutiny. After this initial

demonstration that the governmental regulation would impose a burden upon the free exercise of religious beliefs, the burden shifts to the government to "justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." Lee, supra, 50 U.S.L.W. at 4203. In order to meet this burden there must have been, and there was not, a showing by the NLRB that the system could not function if the Amish were permitted to challenge the system because of the burden it placed on their beliefs, Lee, supra, 50 U.S.L.W. at 4204, or a showing that exemption of Marti would "present an administrative problem of such magnitude [as would have] rendered the entire statutory scheme unworkable." Sherbert v. Verner, supra, 374 U.S. at 408.

However, judicial inquiry into the constitutional validity of governmental regulation of conduct predicated upon religious beliefs does not end with the identification of an arguably compelling governmental interest in imposing the regulation or restriction. Rather, after a governmental interest has been identified,

it is necessary to weigh that governmental interest in regulating the activity at issue against the extent of the burden which the regulation has upon freedom of religion. See, Wisconsin v. Yoder, 406 U.S. 205, 221 (1972); Sherbert v. Verner, 374 U.S. 398, 406 (1963).

The ultimate burden remains with the government and should not be placed upon the Petitioner (as has been done by the Third Circuit in this case). Lee, supra, 50 U.S.L.W. at 4203, 4204. See also, Sherbert v. Verner, supra, 374 U.S. at 406 ("[o]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitations .... [it is] incumbent upon [the government] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment Rights"); Wisconsin v. Yoder, supra, 406 U.S. at 236 ("incumbent upon state to show with more particularity how its admittedly strong interest in compelling education would be adversely affected by granting an exemption to the Amish").

Consistent with this three-part analysis, this Court has invalidated state or governmental regulation in cases in which the burden which such regulation has upon the exercise of religious beliefs has been found to outweigh the government's interest in imposing the regulation. E.g., Wisconsin v. Yoder, supra, 406 U.S. at 234 (state interest in compulsory education is outweighed by the potentially destructive effect upon Amish community and way of life which would result from requiring Amish children to attend school until age sixteen); Sherbert v. Verner, supra, 374 U.S. at 408-409 (invalidated unemployment compensation regulation as applied to Seventh Day Adventist who was unable to work on Saturdays because of religious beliefs).

On the other hand, in cases in which the burden of government regulation on religion is slight, or in which the governmental interest is sufficiently compelling to outweigh that burden, claims that the governmental regulation violates the Free Exercise clause have been rejected. E.g., United States v. Lee,

supra, 50 U.S.L.W. 4203 (exemption from requirement to pay social security taxes not required where effect of such exemption would be to undermine the "fiscal vitality of the social security system"); Prince v. Massachusetts, 321 U.S. 158 (1944) (interest of state in protection of children outweighs burden on child's religious beliefs caused by prohibiting children from selling religious literature in public places); Braunfield v. Brown, 366 U.S. 599 (1961) (interest of state in providing uniform day of rest outweighs burden on religion of Jewish merchants caused by Sunday Closing Law).

In the instant case, the Third Circuit departed from the above analysis by reading this Court's decision in United States v. Lee to require Petitioner to satisfy the burden of establishing that it qualifies for an exemption to the Board's jurisdiction, rather than placing the burden upon the Board of establishing that its interest in asserting jurisdiction over Jacobo Marti constitutes an overriding interest which justifies the burden placed upon the religious freedom of the Amish

farmers in the New Wilmington area. The Third Circuit acknowledged the stipulated evidence that in 1973, the Association advised Jacobo Marti that because of the religious beliefs of its members the Association would terminate its Agreement if Jacobo Marti were to be unionized, but speculated that because the record did not affirmatively demonstrate the absence of a change in precepts by the Amish-controlled Association, Petitioner had not met its burden of establishing that the Board's assertion of jurisdiction would infringe upon the Amish farmers' exercise of their religious beliefs. App. A at 9a-10a.

Initially, it is apparent that the Third Circuit's statement and premise to the effect that "[w]hether the Association is still of that view is a crucial fact that is not in the record" (App. A at 7a-8a) ignores that portion of the stipulation stating that the agreement would be terminated solely "because of the tenets of the Amish religion". It is simply unjustified and incorrect to assume that, in a period of six short years, the Amish may have abandoned the traditions and

beliefs that they have adhered to strictly and "statically" for centuries before. See, Wisconsin v. Yoder, supra, 406 U.S. at 210, 216-217.

Moreover, this speculation by the Third Circuit is totally inconsistent with the admonition of this Court in United States v. Lee that it is not "within 'the judicial function and judicial competence' ... to determine [who] has the proper interpretation of the Amish faith." Lee, supra, 50 U.S.L.W. at 4203. "Courts are not arbiters of scriptural interpretation." Thomas v. Review Board, supra, 101 S.Ct. at 1431. By engaging in this unwarranted speculation as to the present nonexistence of the religious proscription which would prevent the Amish from continuing their relationship with Jacobo Marti, the Third Circuit improperly shifted the burden to Petitioner of showing that the interference with free exercise rights created by the Board's assertion of jurisdiction justified an exemption from jurisdiction. By placing that burden on Petitioner, the Third Circuit followed an analysis exactly opposite that set forth in

the decisions of this Court discussed at pages 15-21, supra, which requires the government to demonstrate that its interest in the application of the statute in question is sufficiently compelling to override the burden placed on religious freedom by such application.

Had the Third Circuit followed this Court's decisions by requiring such a showing by the NLRB, the evidence clearly would have compelled a finding that the Board's interest in asserting jurisdiction over Jacobo Marti is minimal at best, because the probable effect of such assertion would be to remove the only source of milk for the plant -- the Association -- thereby leading to the closing of the plant and the layoff of the very employees whom the Act is designed to protect.[6] Moreover, neither the Court of

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[6] Additionally, twenty of the 89 persons employed by Jacobo Marti are members of the Old Order Amish faith, and these 20 employees would not be permitted to continue working in Jacobo Marti's plant if it were to be unionized. This would not only constitute a burden upon the right of those individuals to continue their (continued)

Appeals nor the NLRB considered the Employer's alternative but related arguments that the purposes of the NLRA would not be effectuated if the proximate result of the assertion of jurisdiction was the loss of work by the very employees the Act is designed to protect. This should have been taken in account by the Court below in balancing the interests of the parties to determine if the NLRB justified the limitation on religious liberty as overriding or compelling.

The Third Circuit Court of Appeals has misinterpreted and misapplied this Court's

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6 (continued)
employment without violating any tenets of their religious beliefs, but also would impose a severe hardship upon the Employer with respect to the stability of its workforce. The Third Circuit's speculative conclusions to the contrary, at App. A at 12a-13a, fly in the face of undisputed record evidence. The record affirmatively and undisputedly showed that the employees who are members of this sect would be required to end their employment if the cheese plant is organized. The Court of Appeals improperly "delved into the contours of religious belief" to suggest that alternative accommodation had to be possible.

decision in Lee, supra, in another important respect. See App. A at 13a. It is well established that the continued existence of the Amish communal way of life is entirely dependent upon derivation of income from farming. See, Wisconsin v. Yoder, 406 U.S. 205, 210, 216-217 (1972); Hostetler, supra at 67-68, 99. The Amish did not enter into the "commercial activity" involved in this case as "a matter of choice," but as the result of legitimate religious compulsion in the face of religiously unacceptable alternatives. The commercial activity involved in United States v. Lee, supra, was completely divorced from Lee's religious beliefs. Here, the activity stems from the very fabric of those beliefs and is essential to their effectuation.

In short, the effect of the ruling of the Third Circuit "forces [the Amish] to choose between following the precepts of [their] religion and forfeiting [income from their farming], on the one hand, and abandoning one of the precepts of [their] religion in order to [market their milk] on the other hand. Governmental imposition of such a choice puts the same kind of burden

upon the free exercise of religion as would a fine imposed against [the Amish for refusing to use electricity, to work on Sunday or to deal with labor unions]." Sherbert v. Verner, supra, 374 U.S. at 404.

The Court of Appeals has decided the question presented in a manner totally inconsistent with this Court's decisions concerning the limitations placed upon government regulation by the Free Exercise clause. Because the Third Circuit's decision implicates important constitutional rights and will have a potentially fatal effect upon the continued viability of the Old Order Amish community in New Wilmington, Pennsylvania, this Court should issue a writ of certiorari to resolve these First Amendment issues.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

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